

BEFORE THE GOVERNING BOARD OF THE
LEMON GROVE SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

CERTIFICATED EMPLOYEES OF THE
LEMON GROVE SCHOOL DISTRICT

Respondents.

Case No. 2012030801

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Lemon Grove, California, on April 20, 2012.

William A. Diedrich, Esq., Atkinson, Andelson, Loya, Ruud & Romo, represented the Lemon Grove School District.

Jon Y. Vanderpool, Esq., Tosdal, Smith, Steiner & Wax, represented Kevin Andreen, Jessica Bargaquast, William Brookolo, Darryl Cooke, Jeannette Estrada, Kyle Griffith, Kelly Jaynes, Francisco Lacsamana, Yadira Melendrez-Ramos, Teresa Moudry, Susan Nunez, Cynthia Piligian, Irma Poulin, Marcia Reisch, Silvia Sana, Diane Sievenpiper, Sarah Slade, Gustavo Vazquez, and Erin Walker.

There was no appearance by or on behalf of Laurel Dehnel, Shari Erlendson, or Anne Oswalt.

The matter was submitted on April 20, 2012.

SUMMARY OF PROPOSED DECISION

The Board of Education of the Lemon Grove School District determined to reduce or discontinue particular kinds of services provided by teachers for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

The District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, "bumping," "skipping," and breaking ties between/among employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Respondents listed on Exhibit "A" (Respondents) are certificated employees of the Lemon Grove School District (District).

2. Ernest Anastos, the District's Superintendent (Superintendent), notified the District's Governing Board (Board) of his recommendation that the District reduce or discontinue particular kinds of services for the 2012-2013 school year.

3. On February 28, 2012, the Board adopted Resolution No. 11-12-12 reducing or eliminating particular kinds of services for the ensuing school year, establishing "competency" criteria for purposes of displacement, and establishing criteria for resolving ties among certificated employees with the same date of first paid probationary service. The Board directed the Superintendent or his designated representative to send notices to all employees possibly affected by the reduction or elimination of particular kinds of services.

Resolution No. 11-12-12 states, in pertinent part:

Particular Kinds of Service	Full Time Equivalent
Elementary (K-6) Self Contained Classroom Teaching Services	6.0
Specialized Academic Instructor (RSP Teacher)	1.0
Middle School Physical Education Teaching Services	1.0
Elementary School Principal	1.0
Middle School Assistant Principal	1.0
Middle School Dean of Students	0.57
Subtotal	10.57
Temporary services as follows:*	
Elementary (K-6) Self Contained Classroom Teaching Services	6.0
Middle School Social Science Teaching Services	1.0
Social Worker	2.2
EDP Lead Teacher Services	1.0
Teacher on Special Assignment Services	1.43

Elementary (K-6) Intervention Support Teaching Services	13.71
Specialized Academic Instructor (RSP Teacher)	0.2
Subtotal	25.54

* Inclusion of temporary services within this Resolution is not intended to grant those individuals who are impacted any rights greater than provided by law, nor to nullify any provisions within each impacted individual's employment contract, nor to supersede any other Resolution by this Governing Board to release or otherwise terminate the services of any impacted individual.

The proposed reductions totaled 25.54 full-time equivalent (FTE) positions.

4. The Board established "competency" criteria in its Resolution, which states, in part:

WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to retain certificated employees who have Bilingual Cross-cultural Language, and Academic Development ("BCLAD") authorization to teach English language learners and the special training and experience that comes therewith; and

WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to retain certificated employees who teach in the District's bilingual dual immersion program and therefore possess the special training and experience that comes therewith; and

WHEREAS, this Board has determined that there is a significant and compelling need to retain teachers who have attained National Board Certification, and therefore possess the training and experience that comes therewith; and

WHEREAS, Education Code section 44955(d) authorizes this Board to deviate from terminating a certificated employee in order of seniority for the above reasons, if necessary.

NOW, THEREFORE, BE IT RESOLVED by the Governing Board of the Lemon Grove School District:

[¶] . . . [¶]

7. That the seniority and qualifications of some of the

employees in the services being reduced or eliminated are such that they have displacement rights, and that no employee will be terminated while a less senior employee is retained to render a service which the more senior employee is both certificated and competent to render.

8. That in observing the statutory rights of a more senior certificated employee performing services in a subject matter or field identified by the District for reduction or elimination to displace a less senior certificated employee, the more senior certificated employee may displace less senior certificated employee if it is established to the satisfaction of the District that the more senior certificated employee is both competent and credentialed to render the services performed by a less senior certificated employee.

9. That "competency" as described in Education Code section 44955(b) and referenced in paragraph 8 above, for the purposes of displacement, shall necessarily include possession of: (1) a valid credential in the relevant subject matter area; (2) "highly qualified" status under the No Child Left Behind Act in the position to be assumed; (3) if displacing an employee who possesses a BCLAD certification, possession of a BCLAD certification; (4) special training and experience necessary to meet the job requirements of specialized positions (such as AVID teachers, EDP lead teachers, Dual Immersion teachers); (5) if displacing an employee who possesses a National Board Certification, possession of a National Board Certification; (6) for elementary (K-5) teaching positions, or a self contained 6th grade classroom teaching position, at least (1) year of experience in the past five (5) years teaching at the elementary level or in a sixth grade self contained classroom; and (7) for positions involving instruction to 6th 7th and/or 8th grade students, other than a self contained 6th grade classroom, at least one (1) year of experience in the position or assignment within the last five (5) years. . . .

The Board established the competency criteria for purposes of bumping or displacing more junior employees with senior employees who were competent and credentialed to hold the position held by the junior employees. There is no evidence that the competency criteria were arbitrary or capricious or otherwise invalid.

5. In its Resolution, between employees who first rendered paid service to the District on the same date, the Board adopted "Criteria to be Applied to Determine Order of Layoff for those Certificated Employees with the Same Date of First Paid Probationary

Service” and clear instruction for implementation of the criteria. The order of termination was based on the needs of the District and its students.

6. On February 28, 2012, the Board adopted Resolution No. 11-12-13, ordering the release of temporary certificated employees from their temporary assignment at the end of the 2011 – 2012 school year in order to effectuate the reduction of particular kinds of services; further, the Board directed the Superintendent or his designated representative to notify the temporary employees of the foregoing. The District complied and allowed the temporary employees to participate in the hearing. There is no issue regarding the temporary status of any employee in this District. Pursuant to Resolution No. 11-12-13, all temporary certificated employees will be released at the conclusion of the 2011-2012 school year.¹

7. On March 12, 2012, Glenn Heath, the District’s Director of Human Resources (Human Resources Director) served permanent and probationary certificated Respondents with “Notice of Recommendation that your Services Will Not Be Required for the Ensuing School Year (2012-2013),” a copy of Board Resolution No. 11-12-12, and the reasons for the Board’s action. In addition, the Human Resources Director advised Respondents of the right to hearing, that a Request for Hearing was required to be delivered to the District’s office no later than March 22, 2012, and that the failure to request a hearing would constitute waiver of the right to hearing.

8. On March 12, 2012, the Human Resources Director served Respondents employed under a temporary contract of employment with “Notice of Recommendation that your Services Will Not Be Required for the Ensuing School Year (2012-2013).” In the Notice, the Human Resources Director stated, in part:

The District provides you with this notice of layoff and right to request a hearing in connection with the layoff proceedings applicable to probationary and permanent employees under Education Code sections 44949 and 44955. This notice is provided to you as a precaution by the District. Based on your service under a valid temporary contract of employment, the District believes you are correctly classified as a temporary employee, and not entitled to participate in the layoff or hearing process. However, this notice is provided in the event you believe, or it is determined, your status is other than that of a temporary employee, and you wish to contest your release as a

¹ The District requested an order affirming its Decision releasing temporary employees. Pursuant to Resolution No. 11-12-13, the Board released all temporary employees at the conclusion of the 2011 – 2012 school year. Given the facts in Finding 8, the issue is moot and outside the scope of the jurisdiction (Education Code sections 44949 and 44955) of this hearing.

temporary employee or otherwise seek a determination whether there is cause for not reemploying you for the next school year.

By providing this right to request a hearing, it is not the District's intent to convert your temporary employment status to that of a probationary or permanent employee. In the event it is determined you are a probationary or permanent employee by operation of law, your right to a hearing and any accompanying layoff rights, has been afforded under Education Code sections 44949 and 44955 via this notice.

He attached a copy of the Board Resolution No. 11-12-13 and stated the reasons for the Board's action. In addition, the Human Resources Director advised Respondents of the right to hearing, that the Request for Hearing must be delivered to the District's office no later than March 22, 2012, and that the failure to request a hearing would constitute waiver of the right to hearing.

9. Respondents submitted a timely Request for Hearing to determine if there was cause for not re-employing him or her for the ensuing school year.

10. On March 23, 2012, the Superintendent made and filed an Accusation Against Certificated Employees. He served Respondents who submitted a Request for Hearing with an Accusation, Notice of Defense, Notice of Hearing and relevant sections of the Education Code and the Government Code. The Superintendent notified Respondents that **"....unless a Notice of Defense signed by you or on your behalf, is received by the District on or before March 28, 2012 the Board may proceed on the Accusation without a hearing. If you decline or fail to request a hearing by the above date, such declination or failure will constitute a waiver of your right to a hearing."**

11. Any Respondent who filed a Request for Hearing participated in the hearing, irrespective of whether or not a Notice of Defense was filed in a timely manner.

12. The District served Respondents with a Notice of Hearing setting the hearing for April 20, 2012, in accordance with Government Code section 11509.

13. All prehearing jurisdictional requirements were satisfied.

14. The Human Resources Director was responsible for implementing the technical aspects of the layoff. The District developed a seniority list for probationary or permanent certificated staff that included, among other matters, the name of the certificated employee, first date of paid service, assignment, position, credentials, graduate degree(s), area of emphasis, status, CLAD², and application of tie-breaker criteria.

² Crosscultural Language and Academic Development Certificate

15. The Human Resources Director used the seniority list to develop a proposed order of layoff list to determine the least senior employees currently assigned in the various services being reduced. Then, the District determined whether the least senior employees held credentials in another area that would entitle them to “bump” other junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. Then, the District checked the credentials of affected individuals and whether they could “bump” other employees.

16. The District considered all positively assured attrition in determining the actual number of final layoff notices to be delivered to its certificated employees.

17. The services that the Board proposed to reduce were “particular kinds of services” that can be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious but constituted a proper exercise of discretion.

18. The Board’s reduction or discontinuance of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuance of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

19. No certificated employee junior to any Respondent was retained to perform any services that any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

2. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford vs. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the Lemon Grove School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position that he/she is certificated and competent to fill. In doing so, the senior

employee may displace or “bump” a junior employee who is filling that position. (*Lacy vs. Richmond Unified School District* (1975) 13 Cal. 3d 469.)

5. The District has the discretion to determine whether teachers are certificated and competent to hold the position for which said teachers have been skipped and retained. (*King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016) Junior teachers may be given retention priority (skipped) over senior teachers if the junior teachers possess superior skills or capabilities that their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831)

6. No employee with less seniority than any Respondent is being retained to perform a service that any Respondent is certificated and competent to render.


7. All arguments not addressed herein are not supported by the evidence and/or the law and therefore rejected.

ORDER

1. The Accusation served on Respondents listed on Exhibit “A” is sustained. Notice shall be given to these Respondents before May 15, 2010 that their services will not be required for the 2012-2013 school year because of the reduction or discontinuance of particular kinds of services.

2. Notice shall be given in inverse order of seniority.

DATED: April 27, 2012


VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

LEMON GROVE SCHOOL DISTRICT
EXHIBIT "A"
RESPONDENTS

Andreen, Kevin
Bargenquast, Jessica
Brookolo, William
Cooke, Darryl
Dehnel, Laurel
Erlendson, Shari
Estrada, Jeannette
Griffith, Kyle
Jaynes, Kelly
Lacsamana, Francisco
Moudry, Teresa
Nunez, Susan
Oswalt, Anne
Piligian, Cynthia
Poulin, Irma
Reisch, Marcia
Sana, Silvia
Sievenpiper, Diane
Slade, Sarah
Vazquez, Gustavo
Walker, Erin